***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

# CONSOLIDATED
# BRIEF FOR APPELLANTS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

398

Nos. 21,804, 21,805, 21,806

EARL COLEMAN,
ALVIN TOBIN,
RONALD ALLSTON,
Appellants

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA



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February 4, 1969

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## ISSUES PRESENTED FOR REVIEW *

I. Did the trial judge abuse her discretion by refusing to exclude or confine impeachment questions involving similar and remote crimes of appellant Ronald Allston, and by denying a motion for mistrial in connection with such questions?

II. (a) Was an adverse inference of guilt improperly created by the trial court's ruling that permitted counsel for a co-defendant (Winfield Roberts) to call in open court for the appellants to testify, when previously the trial judge had been specifically advised outside the jury's hearing that none of the appellants would elect to take the witness stand?

(b) Did the trial court err by denying appellants' motion for mistrial after counsel for co-defendant Roberts had made repeated references in final argument to appellants' failure to testify in support of Roberts?

(c) Did the trial court err in failing to order, sua sponte, separate trials of the defendants once it became clear that counsel for co-defendant Roberts would call upon the appellants to testify despite his advance knowledge that they would decline to do so?

III. Did the police have probable cause to arrest the appellants (or other authority to seize the vehicle in which appellants were found) and if not, did the trial court err in denying a motion to suppress incriminating evidence which was seized by the police following the arrest and later introduced at the trial?

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* This case has not been previously before this Court.

## STATEMENT OF THE CASE

Appellants allegedly committed robbery at 9:56 a.m. on November 22, 1966 by taking money, property of The National Bank of Washington, 3806 Twelfth Street, Northeast, from the person and presence of five bank employees. They were arrested with appellant Winfield Roberts that same morning and were later jointly indicted on one count of unauthorized use of a motor vehicle (22 D.C. Code § 2204), one count of entering a bank with intent to commit robbery therein (18 U.S.C. § 2113), five counts of robbery under the United States Code (18 U.S.C. § 2113), and five counts of robbery under the District of Columbia Code (22 D.C. Code § 2901). Earl Coleman was also indicted for carrying a dangerous weapon (22 D.C. Code § 3204) but this count was dismissed during the trial (Tr. 752.)[1/]

On May 12, 1967 a pre-trial hearing was held on appellant Ronald Allston's motion to suppress evidence. This motion was based upon Allston's allegation that officers of the Metropolitan Police Department had arrested the jointly charged defendants without probable cause in violation of the Fourth Amendment of the Constitution. On the basis of the testimony of only one witness, Officer Lukic (who was one of the arresting officers), the motion was denied by the District Court (Judge Hart).

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1/ Abbreviated citations are to the reporter's transcript of the pre-trial hearing on the motion to suppress evidence ("H.") and to the reporter's transcript of appellants' trial ("Tr." 1-537; "Tr(a)." 1-139; Tr. 737-93; "Tr(b)." 1-88; Tr. 894-1295).

The trial of the appellants began on January 18, 1968 before Judge Matthews in the United States District Court for the District of Columbia. On the seventh day of trial, January 29, 1968, the jury found the defendants guilty as charged. Each defendant was subsequently sentenced to a term of one to five years for unauthorized use of a motor vehicle and five to fifteen years on the remaining counts, said sentences to run concurrently. Thereafter, on March 7 and March 15, 1968, Judge Matthews entered orders authorizing the appellants to prosecute their appeals to the United States Court of Appeals for the District of Columbia Circuit in forma pauperis and directing that a transcript of the trial proceedings be prepared at the expense of the Government for use on appeal. On November 26, 1968 the transcript was docketed with this Court. Thereafter, on December 31, 1968, a motion was filed to vacate counsel's appointment with respect to appellant Winfield Roberts on the ground of a possible conflict of interest. This motion was granted on January 27, 1969.

## STATEMENT OF THE FACTS RELEVANT TO THE ISSUE PRESENTED FOR REVIEW

### A. Motion to Suppress Evidence

On April 28, 1967, appellant Ronald Allston filed a motion to suppress evidence alleging that he and the jointly charged co-defendants

were arrested without probable cause on the morning of November 22, 1966, and that the evidence seized from their persons or from the vehicle they were found in should therefore be suppressed.[2/]

At the pretrial hearing on Allston's motion, before Judge Hart, Police Officer Lukic testified that while he and his partner, Officer Yates, were cruising in their squad car in the Northeast section of the city, they overheard three "lookout" broadcasts. He related that at approximately 9:55 a.m. his car was alerted that The National Bank of Washington had been robbed. At about 10:10 a.m. a second lookout was broadcast for three or four Negro men,[3/] one of whom was dark-skinned and heavy built with a bushy mustache. The men had been seen escaping in a blue Mustang automobile with D.C. registration and a specific license tag reference (H.7).

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2/ The request for suppression specified the following materials:
(1) Two pistols.
(2) A quantity of money.
(3) Various articles of clothing including several pairs of sunglasses, one tan three-quarter length coat, one black jacket, one blue jacket, several hats, and various scarfs.
Many of these seized articles were introduced in evidence at the trial by the government.

3/ The notes of the officer who called the dispatcher mentioned three--not four--persons (Tr. 905). But Officer Lukic's testimony referred to four (H.7).

Officer Lukic's car was on the way to Kenilworth and Eastern Avenues when a third transmission advised that the Mustang had been found abandoned and that the robbers might be in a U-haul, van-type truck of unknown registration (H. 9, 10).[4/]

Shortly after 10:15 a.m., from a position on the overpass on Eastern Avenue overlooking Kenilworth Avenue, Officers Lukic and Yates observed a Negro man driving a cream and orange U-haul truck into the District of Columbia (H. 10). They proceeded after it. Using his siren and red light, Officer Lukic pulled the truck to a stop (H. 10-11). He testified that at this point he could see some features of the driver (H. 15), but that it was not until sometime after he turned on his siren and red light that he noticed the driver was dark-skinned and had a mustache (H. 15). When the officer approached the driver, who got out of the U-haul and walked toward the squad car, he saw two heads through the rear door window of the truck. Both officers then became suspicious (H. 23),[5/] and Officer Lukic immediately told the driver of the U-haul to turn and put his hands on the side of the truck. At this point Officer Yates

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4/ The officer testified that the lookout may have mentioned that the truck was a Ford (H. 19-20). However, witness Teresa Rosser testified at the trial that she was unable to fully describe the blue car, later found to be a Mustang, because "I don't know makes or models . . ." (Tr. 224). The final police lookout broadcast was based on information Miss Rosser had given to the police officers.

5/ Officer Lukic testified: "At that time we became suspicious because in our earlier observation of the truck we did not see anyone else plainly in our view of being in the truck except the driver" (H. 23). At trial, Officer Lukic testified that at this point he pulled his revolver (Tr. 303).

opened the rear doors of the truck and saw three Negro males seated on a mattress, loose articles of clothing and a torn sack of money (H. 24). A pistol was found on the person of the driver, who was later identified as appellant Earl Coleman. Another pistol was found under the front seat of the truck (H. 24).[6/]

In urging that the seized evidence (pistols, money, clothing, etc.) should be suppressed, counsel for appellant Allston pointed out that the police broadcast had inadequately identified the truck in which appellants were found, and that there was no probable cause for stopping and searching the appellants. Judge Hart denied defendant's motion on the ground that at the time the truck was stopped there was probable cause for an arrest--if not for himself or the defense attorney, then for a well-trained, experienced police officer (H. 29-30).[7/]

During the course of the trial, it developed that after the Mustang was found abandoned the police attempted to ascertain whether the robbers had made their escape through an adjacent woods (Tr. 243, 933). Soon after witness Teresa Rosser was interviewed and on the basis of her statement, the police (Officer Ervin) radioed the dispatcher the information for the

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6/ It developed at the trial that a thorough search of the U-haul was not made until after the truck had been driven to police headquarters (Tr. 303).

7/ Judge Hart concluded: "Well, there wouldn't be any probable cause for you or myself, Mr. Mack, because we aren't experts in this. But the police have a tremendous expertise in this field, and we don't judge probable cause by what would be probable to you or I, we judge probable cause by what would be probable cause to them" (Tr. 29-30).

third and final lookout broadcast. Miss Rosser testified that on the morning of November 22, she observed from her window a U-haul truck parked outside her apartment (Tr. 221). Later she heard what sounded like an automobile leaving and noticed that the U-haul was gone (Tr. 221-22). She recalled telling the police that while she was not sure of the color, she thought the bottom of the U-haul was either green or orange (Tr. 230).[8/] Prior to Officer Lukic's trial testimony concerning the stopping of the U-haul (which was Econoline not van-type), defense counsel renewed the motion to suppress evidence on the basis of these new facts disclosed in the Government's case in chief (Tr. 293-94). The trial judge (Matthews, J.) denied this request without a hearing on the sole ground that Judge Hart had already ruled on the motion (Tr. 293-94).

At the close of the Government's case, the trial judge stated that she had just reviewed the transcript of the preliminary hearing and wished to know the reasons why the motion to suppress evidence was earlier renewed (Tr. 1046-54). Defense counsel stated that the new information disclosed during the Government's case, such as the discrepancy in the color (green) and the type (econoline) of the U-haul truck (Tr. 1047), together with the Court's prior rulings limiting cross-examination with respect to probable cause, made a new hearing necessary. The motion was again denied (Tr. 1066).

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8/ Officer Ervin could not recall whether Teresa Rosser had given a color (Tr. 260). While his hand-written notes contained no reference to color, his official statement, later given to the Robbery Squad (Tr. 258), specified a green vehicle (Tr. 260, 231).

B. Trial Proceedings

Prior to the Government's opening statement, Judge Matthews declined to rule on a request by counsel for Ronald Allston for an order limiting the scope of cross-examination of "character" witnesses with respect to Allston's prior convictions (Tr. 23-26). At the close of the Government's case in chief, which consisted principally of testimony by bank employees and police officers, Allston's counsel renewed his prior request (Tr. 769-70, 786) and advised the court that twelve witnesses (some of whom had known the defendant only since 1962) would testify with respect to the defendant's reputation for peace, good order, honesty and integrity (Tr(b). 10, Tr. 771). The judge ruled that by virtue of the Supreme Court's Michelson decision,[9/] the prosecution could ask these witnesses if they were aware of the defendant's prior convictions of record, including those that occurred before 1962 (Tr. 786-88; Tr(b). 9-10).

Later, Inez Milton was called as a character witness for Ronald Allston. She testified that during the nine years of her acquaintance with the defendant his reputation for peace, good order, and honesty was good (Tr. 965, 969). The prosecutor, over timely objection, was then permitted to ask questions involving Allston's three prior petty larceny convictions and a ten-year old violation of the Federal Narcotics Laws (Tr. 977-78). The jury was instructed not to assume the incidents actually took place or to consider them with respect to Allston's guilt (Tr. 980-81). Allston's motion for mistrial was denied (Tr. 983).

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9/ Michelson v. United States, 335 U.S. 469 (1948).

Following an opening statement[10] Winfield Roberts testified that on the morning of November 22, 1966, a U-haul truck driven by Earl Coleman, in which Ronald Allston and Alvin Tobin were riding, paused at the bus stop where he was standing. When Alvin Tobin, the only person Roberts knew, asked if he wanted a ride into the District of Columbia, Roberts climbed into the rear of the truck where the passengers were riding (Tr(b). 18-20, 66-74).

As his next witness, Roberts' counsel called Earl Coleman (Tr(b). 79).[11] At the bench conference which followed, counsel for Roberts vigorously objected to the trial judge's suggestion that the defendants be asked out of the presence of the jury whether or not they would testify (Tr(b). 79-80, 83-84). Counsel for Allston and Tobin, on the other hand, stated that their clients did not intend to testify and would object to any reference being made in the presence of the jury with respect to the matter of their silence (Tr(a). 83-84). This latter objection was overruled. Then in succession Coleman, Allston and Tobin were called by Roberts' attorney in open court to testify as a witness and each declined to testify. The jury was instructed that the defendants had the right to be silent (Tr(b). 84-86).[12]

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10/ Ronald Allston's attorney stated that he could not make an opening statement because of the trial judge's ruling with respect to the admissibility of the defendant's prior convictions (Tr(b). 11-12).

11/ Co-counsel were unaware that their clients would be called (Tr(b). 80-81).

12/ The following sequence transpired before the jury:

The Court: Earl Coleman has the right to take the stand or not to take it. Mr. Toomey?
Mr. Toomey: Yes, Your Honor. Mr. Coleman declines to testify.
The Court: Very well.

(continued)

Several days later at the close of the Government's case, counsel for Tobin, over the objection of Roberts' attorney, moved to reopen his case in order to testify (Tr. 1057). Tobin's counsel stated that the defendant was surprised by the substance of Roberts' testimony (Tr. 1068) and by the fact he was called as a witness (Tr. 1088). The trial judge first denied and then granted the motion (Tr. 1083, 1096).[13] Tobin then testified that

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12/ (continued)

Mr. Sachs: Your Honor, I will now call Mr. Allston as a witness.
The Court: The defendant Ronald Allston has the right to take the stand or not to take the stand as he sees fit.
Mr. Mack: I object, Your Honor's statement and I ask that it be stricken from the record and that the jury be instructed to disregard it.
The Court: The Court declines to do so, Mr. Sachs having sought to call Mr. Allston as a witness.
Mr. Sachs: If the Court please, I now call Mr. Tobin as a witness.
Mr. Ahearn: On behalf of the Defendant Tobin, we decline to take the stand on the basis of the Fifth Amendment.
The Court: The attorney for the defendant Tobin has declined. You may not call him as a witness.
Mr. Sachs: If the Court please, may the record indicate the manner in which the various defendants are asserting their privilege? ***
The Court: You are not making any further statement in reference to the defendants.***Ladies and gentlemen, a defendant who desires to adduce evidence may do so. (Tr(b). 84-86).

13/ In considering Tobin's request, the judge stated: "I don't want to harm Mr. Sach's client [Roberts] in any way" (Tr. 1082).

he and Allston were standing by a laundromat near the bus stop on Kenilworth Avenue when they were picked up by the U-haul driven by Earl Coleman (Tr. 1099-1102).

Winfield Roberts' closing argument[14/] was twice interrupted by objections that counsel's statements constituted improper comment on the co-defendants' failure to testify (Tr. 1218-21).[15/] The trial judge requested counsel to cease commenting and noted the jury had previously been instructed as to the defendants' rights (Tr. 1219-20). A motion for mistrial was denied (Tr. 1222).

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14/ Counsel for Allston advised that he would make no final argument because of the Court's ruling on the defendant's prior convictions and on the motion to suppress (Tr. 1045).

15/ The following are two excerpts from counsel's argument:

> Mr. Sachs: ***Roberts didn't even know Coleman and Allston. You heard him call each one of these defendants to the stand and you probably wondered why and how I intended to prove Roberts' story or how I was going to be able to say to each one of these other men: "Is it true that Roberts doesn't know you as he says he doesn't", but I didn't have that opportunity. That was my purpose, in trying to call them, because the only way I could support his testimony is by putting some evidence on the stand to give you the situation -- (Tr. 1218-19).

> Mr. Sachs: ***What circumstances do we have -- they are difficult to overcome. I would ask you this hypothetical case, that probably may never occur, but just think of this: You and I walk out into the corridor alone during a recess and then on reentering the courtroom you say: "That person took $100 out of my pocket". Now, there are just the two of us. How do I deny it ever happened, except by taking the stand and saying "I didn't do it"? How would one prove that this never occurred? Now, isn't Roberts in that same position? These men wouldn't testify for him, so there he is -- ***
>
> Well, members of the jury, how else would you overcome that statement by someone whom you know is telling the story about you, about a crime which you never committed? How would you go about it? How would you be able to refute this testimony? (Tr. 1219-20).

The trial judge's final instructions contained, inter alia, a general instruction with respect to a defendant's failure to testify and warning that Ronald Allston's prior convictions should be considered only in regard to the strength of his character witness' testimony.

The instruction regarding the failure of a defendant to testify reads as follows:

> The jury is instructed that a defendant in criminal case has an absolute right not to testify and the jury must not draw any inference against a defendant because he did not testify. A defendant who wishes to testify can do so, in which event his testimony is to be judged by the jury in the same way as that of any other witness. (Tr. 1246).

The admonition with respect to Ronald Allston's prior convictions reads, in pertinent part as follows:

> The basis for the evidence given by the character witness called by Mr. Allston is the reputation of Mr. Allston in the community. The jury is instructed that Mr. Allston, by calling the character witness, put in issue in this case his reputation for peace and good order and for honesty and, because he did so, Mr. Caputy was permitted to question the character witness as to whether she had heard that Mr. Allston had committed certain offenses.
>
> The jury is instructed that regardless of those questions and the answers thereto, the jury is not to assume or infer that any of the offenses inquired about were actually committed. The jury may take into consideration those questions and the answers thereto for a limited purpose only. That is, in weighing the evidence of the character witness, in testing her standard of information on the reputation of Mr. Allston and otherwise passing upon her credibility as a witness.
>
> The jury is directed not to consider such questions and the answers thereto for any other purpose. (Tr. 1247-48).

## ARGUMENT

### I.

### THE LOWER COURT ERRED IN FAILING TO STRICTLY CONFINE THE USE OF RONALD ALLSTON'S PRIOR CONVICTIONS FOR IMPEACHMENT PURPOSES

(With respect to this issue, appellants invite this Court's attention to the following pages of the transcript: Tr. 6, 23-26, 769-71, 786-88; Tr(b). 6, 8-10; Tr. 965-66, 969-71, 976-78, 980-85, 1247-48.)

Inez Milton, who had known Ronald Allston for nine years, testified that his reputation in the community for peace, good order, and honesty was good. The trial judge, over objection, permitted the prosecutor to ask the witness whether or not she was aware of Allston's three petty larceny convictions or his ten-year-old narcotics violation. A motion for mistrial was denied. We submit that the trial judge was required to exercise her discretion, which was timely invoked, to strictly limit or exclude this line of questioning.[16/]

It is an established rule that evidence of an accused's criminal record is inadmissible to prove his disposition to commit crime from which the jury may infer guilt, since a jury is heavily prejudiced against a man who is revealed as a jail-bird. See Wigmore, Evidence §§ 192-94 (3rd Ed. 1940); McCormick, Evidence §§ 156-58 (1954). It is true that by common law rule once the accused calls a witness to testify with respect to his character in the community the Government in some circumstances may inquire into the

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16/ The Court apparently believed that once the subject of reputation was opened by the defendant relevant prior convictions of record were automatically admissible in cross-examination. The Court said that under the Michelson decision, after the defendant opens the subject of reputation, "I don't feel that I should foreclose the other side from introducing evidence which is pertinent on that subject" (Tr(b). 9). In response to an inquiry by defense counsel, the Court stated "If I

witness' knowledge of the defendant's prior convictions for the limited purpose of testing the foundation and the reliability of his testimony. But since the likelihood of prejudice to the accused is very high, the trial judge must give a limiting instruction and is invested with wide discretion to confine this line of interrogation.

Michelson v. United States, 335 U.S. 469 (1948) provided one of the infrequent considerations of the common law rule by the Supreme Court. Justice Jackson, for the majority, observed that the practice merited many criticisms. He noted that "the jury almost surely cannot comprehend the judge's limiting instructions," yet refused to fashion an entirely different rule for all federal courts since the instruction is no less effective than where the jury is cautioned to ignore as to one defendant statements made in the co-defendant's confession. Nevertheless, he stressed that the trial judge must cautiously exercise his discretion in deciding whether to permit such cross-examination. "Wide discretion," he cautioned, "is accompanied by heavy responsibility on trial courts to protect the practice from any misuse." 335 U.S. at 480.

This Court has attempted to avoid misuse by imposing on the trial judge " a heavy and difficult responsibility to control" such questioning. 17/

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16/ (Continued) have discretion I am going to exercise it to allow him to ask questions. . ." (Tr. 787). Such a mechanical approach has been specifically rejected. According to this Court, "the Supreme Court has made clear that even though the defendant has opened the door, the trial judge is to decide what passes through." Awkard v. United States, 122 U.S.App.D.C. 165, 168, 352 F.2d 641, 644 (1965).

17/ The court has criticized but not reversed the common law rule. "We do not reverse this long practice at this time." Awkard v. United States, 122 U.S.App.D.C. at 170, 352 F.2d at 646.

Shimon v. United States, 122 U.S.App.D.C. 152, 156, 352 F.2d 449, 453 (1965). As a general rule, the trial court must confine the introduction of prior convictions to situations where they are "highly relevant to establish the character wintess' reliability;" and even in those situations the court must "exclude the cross-examination where prejudice outweighs probative value." Awkard v. United States, 122 U.S.App.D.C. 165, 170, 352 F.2d 641, 646 (1965). Since the likelihood of improper inference from the defendant's prior convictions is as great whether the jury learns of their existence during cross-examination of the defendant or his character witness, the standards for determining whether prejudice outweighs probative relevance often are similar in both cases.

The prejudicial impact of questions directed to the defendant or his witness which involve the same type of offense for which he is on trial is normally considered to outweigh the legitimate probative value of impeachment so that they should be excluded or closely confined. Shimon v. United States, supra, 122 U.S.App.D.C. at 157, 352 F.2d at 454. Such evidence is particularly likely to improperly persuade the jury that "'if he did it before he probably did so this time'." Gordon v. United States, 127 U.S. App.D.C. 343, 347, 383 F.2d 936, 940 (1967).[18/]

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18/ With respect to impeachment of the defendant's testimony by previous similar crimes, this Court has made the following observation:

> ". . . those convictions which are for the same crime should be admitted sparingly; one solution might well be that discretion be exercised to limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strongly reasons for disclosure, and where the conviction directly relates to veracity."

Gordon v. United States, 127 U.S.App.D.C. at 347, 383 F.2d at 940.

In the instant case the trial judge failed to recognize this principle. Allston's multiple petty larceny convictions clearly involved conduct critically similar to that for which he was on trial. They were admitted despite the fact that preceding impeachment questions had successfully demonstrated to the jury the weak foundation for the witness' testimony.[19/] Also, the ruling was made after the Government had acknowledged that the convictions were relevant to character traits of honesty and integrity, and after defense counsel had stated his willingness to limit the witness' testimony to the defendant's reputation for peace and good order (Tr(b). 8).

The opinion in Awkard v. United States, 122 U.S.App.D.C. 165, 352 F.2d 641, is authorative on this issue. In that case the defendant was convicted of simple assault and assault with intent to kill. The trial judge permitted the prosecutor, over objection, to examine the character witnesses as to their knowledge of two previous arrests for assault with a dangerous weapon and a conviction for disorderly conduct. On appeal, this Court held that the trial judge had abused his discretion and specifically acknowledged that "intimation of past crimes, especially crimes similar to the crime charged, are extremely damaging to an accused; merely putting the question, even if the witness has no knowledge of the events adverted to, creates in the minds of the jurors the impression that the events had occurred." 122 U.S.App.D.C. at 169, 352 F.2d at 645. (Emphasis added.)

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19/ The witness had only a hazy recollection of the times and places where the defendant had been discussed (Tr. 969-74). On one occasion she recalled the neighbors saying he was a "nice person" (Tr. 970).

The Awkard decision is controlling here in a second way. In that case, as here, the character witness did not even know the defendant at the time one of the convictions occurred. This Court concluded that asking impeachment questions involving convictions which had occurred subsequent to the time of the witness' acquaintance with the defendant "could not be thought to test the accuracy, reliability, or credibility of the testimony; it served only to prejudice the defendant by the introduction of past offenses." 122 U.S.App.D.C. at 169, 352 F.2d at 645. By the same reasoning we submit that Allston's ten-year-old narcotics conviction was totally irrelevant to test his character witness' reliability, when the witness had known him for only nine years. The question could not serve its legitimate purpose because ignorance of the convictions "could not have impeached her testimony. . . ." Ibid.

The probative value of the narcotics violation was also weak because it was long-past history. This Court has stated that "The nearness or remoteness of the prior conviction is also a factor of no small importance" and that, consequently, even a relevant conviction should be excluded if it occurred many years before the pending charge. Gordon v. United States, 127 U.S.App.D.C. at 347, 383 F.2d at 940.

These errors by the trial judge were not remedied by her cautionary instructions. In the similar context in Awkard this Court warned that "the inadequacy of a cautionary instruction to protect the interests of the defendant is obvious." 122 U.S.App.D.C. at 167, 352 F.2d at 643.

> Cautionary instructions, copiously provided by the trial judge in this case, do not give the accused adequate protection. They cannot prevent the jury from considering prior actions in deciding whether

> appellant has committed the crime charged. The courts need not rest on the assumption that juries can compartmentalize their minds and hear things for one purpose and not for another. 122 U.S.App.D.C. at 169-70, 352 F.2d at 645-46.

In the present case the risk was great that, irrespective of contrary instructions, the jury would assume the prior crimes actually took place and would consider them with respect to Allston's guilt.[20/] The questions regarding prior convictions were extraordinarily detailed. For example, the prosecutor asked, "Have you heard that here in the District of Columbia in criminal case 716-1957, that on the 24th day of October, 1957, defendant Allston was convicted of a violation of the Federal Narcotics Laws?"[21/] Also, the criminal jackets containing the papers filed in the District Court in each case either lay on the prosecutor's desk in full view of the jury or were handled by the prosecutor during the examination (Tr. 983). As noted above, the convictions were particularly persuasive of Allston's guilt since the larceny convictions involved similar crimes. Gordon v. United States, 127 U.S.App.D.C. 343, 383 F.2d 936.

The Supreme Court's recent Bruton decision acknowledged that certain relevant evidence must be completely excluded from trial because its prejudicial impact cannot be adequately limited by cautionary instructions. Bruton v. United States, 391 U.S. 123 (1968). In that case the Supreme Court ruled that a defendant's confession containing incriminating statements

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20/ Since the other appellants were arrested in Allston's company shortly after the crime was committed it follows, a fortiori, that the indicia of his guilt resulting from the admission of his prior convictions also implicated the other appellants to an equal extent.

21/ He asked also "Have you heard that on September the 18th, 1964, in the District of Columbia, Ronald Allston was convicted of petty larceny?" (Tr. 976). The prosecutor then proceeded to inquire about the 17th of June, 1966 and the 26th of January, 1967 petty larceny convictions.

against a co-defendant may not be admitted in their joint trial despite cautionary instructions.[22/] The Court reasoned that there are some times when "the risk that the jury will not, or cannot, follow instructions is so great, and the consequence of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."[23/] Id. at 135. Recently this Court, in commenting on the inadequacy of a cautionary instruction, stated that "Bruton v. United States clearly shows the hollowness of such cautionary instructions and illuminates the charade of pretending that the jury can put out of its mind damaging evidence it has just heard. . . ." Sims v. United States, D.C.Cir. No. 21,300, decided November 15, 1968, slip op., at p. 3. There was great risk in the instant case that the jury would be unable to follow the court's instructions and properly confine the damaging evidence to its legitimate purpose. As the natural impact of knowledge that a defendant has previously committed similar crimes is to overpursuade the jury, we submit that it cannot be said with fair assurance that the jury was not swayed by this evidence. See Kotteakos v. United States, 328 U.S. 750 (1946). Since Allston's substantial rights were affected, his motion for mistrial should have been granted.

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22/ The Court's earlier decision in Delli Paoli v. United States, 352 U.S. 232 (1957), was overruled. It should be noted that by so holding, the Court removed one of the principal supports for its earlier Michelson decision.

23/ The Court had earlier rejected the contention that when determining the confessor's guilt the jury could be relied upon to ignore his confession of guilt if it found the confession involuntary. Jackson v. Denno, 378 U.S. 368 (1964).

In this case the Government sought throughout the trial to prove that the defendants had jointly committed the criminal offenses, fled the scene of the crime together, and were arrested at the same time and place. In the light of the Government's trial strategy we believe it is clear that the introduction of appellant Allston's prior criminal convictions substantially affected not only his rights to a fair trial but the rights of his co-defendants as well. An unwarranted inference of Allston's guilt would suggest to the jury the concomitant guilt of Allston's companions. As we have noted, with regard to the defendant who has been directly prejudiced this Court has held that reversal is warranted where prior convictions have been erroneously admitted, despite the existence of sufficient evidence to support the conviction. E.g., Awkard v. United States, 122 U.S.App.D.C. at 166, 170, 352 F.2d at 642, 646. It is reasonable and appropriate to provide similar relief to co-defendants who have borne an indirect prejudice through their circumstantial association with the defendant whose prior record was placed in issue.

II.

A. THE COURT ERRED BY PERMITTING DEFENSE COUNSEL, OVER OBJECTION, TO CALL UPON CO-DEFENDANTS TO TESTIFY IN THE PRESENCE OF THE JURY

(With respect to this issue, appellants invite the Court's attention to the following pages of the transcript: Tr(b). 79-86.)

Following the testimony of Winfield Roberts, his counsel called upon each of the co-defendants, in the presence of the jury, to take the witness stand, although he and the trial judge had full knowledge of the co-defendants intention not to testify. The only possible reason for making this request in the jury's presence was to draw special attention to the fact that Roberts' co-defendants--the appellants here--were reluctant to testify. We submit that this sequence of events which was sanctioned by the court was prejudicial and should not have been permitted. It created an adverse inference against appellants and thereby unconstitutionally penalized the exercise of their rights to remain silent.

The Fifth Amendment guarantees to the accused the right not be a witness against himself and not to be compelled to testify in any criminal action. E.g., Stewart v. United States, 366 U.S. 1 (1961). To protect these rights for those who elect to rely on the presumption of innocence, Congress has declared that a person's failure to testify in his own defense "shall not create any presumption against him." 18 U.S.C. § 3481. See Bruno v. United States, 308 U.S. 288 (1939). The courts have traditionally held that direct or implied comment or argument upon the failure

of the accused to take the witness stand or testify violates this statute.[25] And in Griffin v. State of California, 380 U.S. 609 (1965), the Supreme Court held such comment also is forbidden by the Fifth Amendment. Id. at 615.

It seems clear that in the present case the jury must have recognized the colloquy between defense counsel and the defendants and between the Court and the attorneys as dramatic comment on the defendants' failure to testify.[26] The silence of the accused was purposely emphasized by counsel's deliberate attempt to draw the jury's attention to the fact he was unable to support Roberts' story by the co-defendants' testimony.

The Court of Appeals for the Seventh Circuit has formerly concluded that an accused's Fifth Amendment rights are violated when a defendant in a joint trial calls his co-defendant as a witness in the presence of the jury.[27] The Court of Appeals for the Third Circuit reached the same

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25/ Stewart v. United States, 366 U.S. 1 (1961); Wilson v. United States 149 U.S. 60 (1893).

26/ Even very indirect reference to a defendant's silence has been deemed improper comment. Statements by the prosecutor in final argument that the testimony of a key witness was not denied may constitute implied comment if the defendant is the only person who could contradict the testimony. Desmond v. United States, 345 F.2d 225 (1st Cir. 1965); Barnes v. United States, 8 F.2d 832 (8th Cir. 1925). A remark by the prosecutor in final argument that no inference should be drawn from defendant's failure to take the stand has been held to constitute adverse comment. White v. United States, 114 U.S.App.D.C. 238, 314 F.2d 243 (1962).

27/ United States v. Echeles, 352 F.2d 892,898 (7th Cir. 1965). One reason the court gave for ordering a separate trial of the defendant who was unable to call his co-defendant was that "if Arrington declined to take the stand, as was his right, Echeles' action in calling him and forcing him to decline to do so in front of the jury would have injected prejudicial error into the record as to Arrington." Id. at 898. See McCormick, Evidence §§122, 132 (1954).

conclusion in a case comparable to this one. United States v. Housing Foundation of America, Inc., et al., 176 F.2d 665 (3rd Cir. 1949). In that case a co-defendant was called as a witness, over objection, and his few responses immediately were stricken from the record. Observing that the privilege of an accused not to be called to testify is broader than the privilege of a witness, the court held that compelling the defendant to take the stand and to testify in a criminal prosecution against him "is so fundamental an error that the judgment must be reversed and a new trial ordered. . . ." Id. at 666.

B. THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR MISTRIAL

(With respect to this issue appellants invite the Court's attention to the following pages of the transcript: Tr. 1057, 1218-21, 1246; Tr(b). 84.)

In his closing argument counsel for Winfield Roberts emphasized that his client had done everything possible to support his testimony. He noted specificially that Roberts had been unable to call as witnesses the only persons who could support his testimony--the co-defendants (Tr. 1218-19). To underscore this point, he related a hypothetical story in which an honest man, who was wrongfully accused by another, had done everything he possibly could do to prove his innocence by testifying in his own behalf while his accusor remained silent (Tr. 1219-20).[28/] Counsel for one or more of the appellants twice objected that this line of argument constituted improper comment and the court, who generally concurred with the objection, instructed the jury that a defendant has an absolute right to remain silent. We strongly believe that counsel's argument created an adverse inference from appellant's election not to testify and that the court's instructions failed to remedy the resulting prejudice.

Equivalent argument by co-counsel was held to warrant a new trial for the prejudiced defendant in DeLuna v. United States, 308 F.2d 140 (5th Cir.

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28/ Counsel argued:

> I would ask you this hypothetical case, that probably may never occur, but just think of this: You and I walk out into the corridor alone during a recess and then on reentering the courtroom you say: "That person took $100 out of my pocket". Now, there are just the two of us. How do I deny it ever happened, except by taking the stand and saying "I didn't do it"? How would one prove that this never occurred? Now, isn't Roberts in that same position? These men wouldn't testify for him, so there he is-- (Tr. 1219-20).

The additional implication here is that the appellants' refusal to testify amounted to concealment of the truth.

1962). In that case one defendant testified that, while traveling in a car and after seeing police, his co-defendant tossed him a package (later found to contain narcotics) with instructions to throw it out the window. In closing argument the defendant's attorney maintained that his client was an innocent victim of circumstances who by testifying had done everything possible to prove his innocence. He urged that no one had denied the defendant's story and then contrasted his client's willingness to testify with the co-defendant's reluctance to take the stand. Despite the neutralizing effect of the court's instructions that the jury should disregard the co-defendant's failure to testify and ample evidence of guilt, counsel's argument was held to constitute improper comment warranting reversal. Id. at 155. See Hayes v. United States, 329 F.2d 209, 222 (8th Cir.) cert. denied, 377 U.S. 980 (1964).

While the antagonism among the defendants in this case was not as sharp as it was in DeLuna, the positions of the respective parties clearly became adverse. Indeed the hypothetical example posed in final argument by Roberts' attorney--wherein the appellants here were identified in the roles of uncooperative wrongdoers--connoted a head-on collision corresponding to that in DeLuna.

It has been observed that the prejudicial force of improper comments on the failure to testify can be corrected, if at all, only by "sharp, immediate and emphatic rebuke by the court, together with an admonition to the jury to disregard the remarks. . . ." United States v. Hamilton, 97 F.Supp. 123, 127 (S.D.W.Va. 1951). In the present case the defendants' refusal to testify on behalf of Winfield Roberts was sustained only by the

trial judge's mild observation that an accused "has the right to take the stand or not as he sees fit" (Tr(b). 84-85). But we believe that severe corrective action was required--particularly following final argument, when counsel's studied references to the co-defendants' silence re-emphasized the dramatic open-court demand for them to take the witness stand. Yet during the closing argument the trial judge at first merely stated "I believe I told the jury the other day that they may testify or not as they please. A defendant has an absolute right not to testify, if that is his choice" (Tr. 1219). Upon further objection her only observation was "I have already instructed the jury. I think you should cease commenting upon the other defendants" (Tr. 1220). In no instance were the comments here met by "direct prohibition or emphatic condemnation of the court." Wilson v. United States, 149 U.S. 60 (1893). The final instructions which included the general charge with respect to an accused's right to remain silent (Tr. 1246) were not sufficiently precise or forceful to overcome the references to the defendants' failure to testify. Ing v. United States, 278 F.2d 362, 367 (9th Cir. 1960). We submit that for these reasons the motion for mistrial made after closing argument should have been granted.

Recent case authority such as Bruton v. United States, 391 U.S. 123, indicates that even the strongest cautionary instruction might have been inadequate in this case. The risk was great that, despite contrary instructions, the jury would draw an adverse inference from the defendants' failure to testify. And the potential consequences to the defendants, were--as in Bruton--crucial.

We submit that there is a strong likelihood that the multiple improper comments contributed to appellants' convictions. Therefore the errors do not fall within the limits of the harmless error rule as formulated in Chapman v. State of California, 386 U.S. 18 (1967), which held that the reviewing court must be able to declare a belief that error was harmless beyond a reasonable doubt. Id. at 24. See Bruno v. United States, 308 U.S. 288, 293-94 (1939). We further urge that the prejudice to appellant Alvin Tobin's defense resulting from being called to testify in open court was not rendered harmless by the fact that he subsequently testified in his own behalf. By permitting Roberts' counsel to call Tobin, the trial judge effectively compelled Tobin to testify in order to mitigate the unfavorable inference that had been created. 29/ The Fifth Amendment forbids the court from placing an accused in a position where he is deprived of a real choice to remain silent. M'Knight v. United States, 115 Fed. 972, 983 (6th Cir. 1902). See Ridfield v. United States, 315 F.2d 76, 80 (9th Cir. 1963).

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29/ Counsel for Tobin moved to reopen his case in order to permit his client to testify after all parties had previously closed their cases (Tr. 1057).

## C. THE COURT ERRED BY FAILING TO ORDER SEPARATE TRIALS SUA SPONTE

(With respect to this issue, appellants invite the Court's attention to the following additional pages of the transcript: Tr(b). 18-22, 66-74; Tr. 1057, 1067-68, 1070, 1078-79, 1088, 1099-1102.)

It became apparent that the theory of defendant Roberts' defense was adverse to that of the co-defendants when Coleman was called as a witness and appellants' counsel presented to the court their opposing positions. Roberts' testimony placed all of his co-defendants in the U-haul; Coleman was called as a witness without advance notice to counsel; Roberts' counsel stated his further intention to call Alvin Tobin and Ronald Allston in the presence of the jury despite flat assurances from their attorneys that they would refuse to testify; and counsel for Allston and Tobin clearly presented the opposing position that for Roberts to force the defendants to claim their privilege in the presence of the jury would violate their right not to testify and to be free from adverse inference. We suggest that once the trial judge made the decision that it was essential to Roberts' defense for him to call his co-defendants, she erred in her failure to order separate trials on the ground that there was an irreconcilable antagonism between the rights of Winfield Roberts and those of his co-defendants.

We acknowledge that when it is necessary in the defense of one defendant to draw the jury's attention to the silence of the co-defendants the trial judge is placed in a dilemma. He must at the same time protect the rights of one defendant to a full and fair defense and also preserve the right of the co-defendants to remain silent, free from prejudicial comment.

A defendant normally is given wide latitude in the conduct of his

defense. He may, if he wishes, testify against his co-defendants, Richey v. United States, 242 F.2d 583 (5th Cir. 1957), and his attorney may comment upon the fact that he testified. If the defendant is tried separately, he may call his co-defendants as witnesses and probably may comment on their failure to testify in the presence of the jury. See DeLuna v. United States, 308 F.2d 140;[30/] Hayes v. United States, 329 F.2d at 222; United States v. Echeles, 352 F.2d 892. Apparently to avoid prejudicially restricting Winfield Roberts' defense, the trial judge here permitted counsel for Roberts' to call the co-defendants as witnesses despite the joint trial. We contend that forcing the defendants to refuse to testify in open court in a joint trial penalized their constitutional right to remain silent.

The decision in DeLuna v. United States, 308 F.2d 140, which was more fully discussed earlier in this brief, strongly supports our position. There the defendant testified against his co-defendant and his counsel commented on the silence of the co-defendant in final argument. The court expressly held that "If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately." Id. at 141. The court in United States v. Echeles, 352 F.2d 892, was similarly concerned with balancing the rights of both defendants. The defendant Echeles was unable to call his

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30/ The majority believed "His right to confrontation allows him to envoke every inference from [the co-defendants] . . . absence from the stand." Id. at 143. The concurring judge disagreed with this view.

co-defendant as a witness for the purpose of introducing evidence concerning his prior exculpatory statements, since they were jointly tried.[31] The court reversed his conviction on the ground that it was error to deny Echeles the opportunity to attempt to introduce such evidence in a separate trial at which the co-defendant could be called without prejudice to his rights - despite the possibility that the co-defendant even then might refuse to testify. Id. 897-98.

The reasoning of these opinions is persuasive in the instant case even though the defendants here did not move for severence. The decisions of this Court have recognized an increasing responsibility of the court to take sua sponte actions in a wide variety of situations.[32] For example, if at any point the trial judge becomes aware of circumstances which indicate a likelihood of incompetency (e.g., through observation of the defendant's behavior), he must sua sponte consider whether that evidence requires him to inquire further into the defendant's competency. Green v. United States, 128 U.S.App.D.C. 408, 389 F.2d 949 (1967); Handsford v. United States, 124 U.S.App.D.C. 387, 365 F.2d 920 (1966). Also, whenever a witness is sought to be impeached by prior inconsistent statements, the trial judge must at that time sua sponte instruct the jury as

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31/ The court deemed it immaterial that Echeles had not actually called his co-defendant. Id. at 897.

32/ The following are a few of the areas where this Court has required the trial judge to take sua sponte actions: appointment of counsel, Lollar v. United States, 126 U.S.App.D.C. 200, 376 F.2d 243 (1967); Bail Reform Act, e.g., Vauss v. United States, 125 U.S.App.D.C. 23, 365 F.2d 956 (1966); admonitions to the jury, e.g., Carsey v. United States, ___ U.S.App.D.C. ___, 392 F.2d 810 (1967); Jencks statements, Williams v. United States, 117 U.S.App.D.C. 206, 328 F.2d 178 (1963).

to the limited purpose for which the statements are received in evidence. Jones v. United States, 128 U.S.App.D.C. 36, 385 F.2d 296 (1967).

The court is responsible to take sua sponte actions because "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." Glasser v. United States, 315 U.S. 60, 70 (1942). This protective duty imposed a responsibility upon the trial judge in the present case of determining whether it was essential to Roberts' defense to call the co-defendants as witnesses. The court concluded this was necessary, but failed to adequately protect the rights of the defendants who elected to remain silent. We believe that more was required.

## III.
## THE LOWER COURT ERRED IN DENYING DEFENDANTS' MOTION TO SUPPRESS EVIDENCE

(With respect to this issue, appellants invite the Court's attention to the following pages of the transcript of the pretrial hearing and the trial: H. 6-7, 9-12, 15, 23; Tr. 221-22, 230-32, 243-44, 905, 933, 1046-54, 1062, 1066.)

In the present case the police search which followed the stopping of the U-haul truck turned up sums of money and articles of clothing. The motion to suppress this evidence was denied by Judge Hart and later by Judge Matthews on the ground that there was probable cause to make an arrest when the vehicle was stopped. We submit that the police lacked necessary authority for their seizure of the vehicle which was the subject of later search.

The time of arrest in the present case is correctly fixed, we believe, at the point when the arresting officers pulled the U-haul to

a stop, using their patrol car siren and red light. We do not suggest that every stopping of a vehicle is tantamount to an arrest. However, reference to existing decisional authorities amply demonstrates that the arrest in the instant case took place when the officers interrupted and forcefully restricted the appellants' liberty of movement. Henry v. United States, 361 U.S. 98, 103 (1959); Bailey v. United States, 128 U.S.App.D.C. 354, 357, 389 F.2d 305, 308 (1967).[33/]

A search incident to lawful arrest is permissible without a warrant only if the Fourth Amendment standard of probable cause has been met prior to the commencement of the search. Beck v. State of Ohio, 379 U.S. 89, 91 (1964); United States v. Di Re, 332 U.S. 581, 595 (1948). While evidence required to establish guilt is not necessary, Brinegar v. United States, 338 U.S. 160 (1949), good faith on the part of the police is not enough. Henry v. United States, 361 U.S. at 102. Indeed, "Under our system suspicion is not enough for an officer to lay hands on a citizen." Id. at 104. Probable cause for arrest exists when the arresting officer is apprised of facts sufficient to warrant a prudent man to believe a crime has been committed and that the person arrested has committed it. E.g., Gatlin v. United States, 117 U.S.App.D.C. 123, 326 F.2d 666 (1963).

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33/ The arrest in Henry was held to have taken place before the police officer, who approached the car, overheard the remarks of the occupant; and in Baily the arrest occurred when the car was stopped despite a contrary intent on the part of the officers. Cf., Rios v. United States, 364 U.S. 253 (1960). The Supreme Court left the question of time of arrest open in that case and, on remand, the trial court found that the taxi stopped voluntarily and was detained by the police only after a crime had been committed in their presence. 192 F.2d 888 (S.D. Calif. 1961).

The Supreme Court has advised that "It is important . . . that this requirement be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen." Henry v. United States, 361 U.S. at 102.

The record in the instant case indicates that at the time the defendants' truck was stopped the arresting officers did not have sufficient facts to support a prudent belief that the driver was a participant in the bank robbery. In the first place, the police were acting on a guess that the robbers had transferred in the District of Columbia to a U-haul truck. Further, the lookout was for three or four Negro men in a van-type, U-haul truck, which may have been described as green. But what the arresting officers actually observed was a single Negro man driving an orange and cream Econoline[34/] U-haul truck from Maryland into the District of Columbia. There was nothing suspicious or dangerous about the behavior of the visible occupant of the vehicle. We submit that there clearly was not probable cause to arrest every Negro male who happened to be driving a U-haul truck on the morning of November 22, 1966 in the Washington, D.C. metropolitan area. And, in this case, it was only after Officer Lukic approached the driver of the truck and saw two heads in the rear compartment that he even became suspicious (H. 23).

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34/ In an "Econoline" truck the cab is attached and there is access from the passengers' seat to the rear section.

The mere presence of the appellants in a vehicle did not create a substitute for probable cause. Henry v. United States, 361 U.S. at 104. The law is well established that an individual's Fourth Amendment rights "belong as much to the citizen on the streets of our great cities as to the homeowner closeted in his study to dispose of his secret affairs." Terry v. State of Ohio, ___ U.S. ___, 88 S.Ct. 1868 (1968). It should be noted also that a later discovery of contraband never validates a prior unlawful arrest. "In law it is good or bad when it starts and does not change character from its success." United States v. Di Re, 332 U.S. at 595.

Two opinions that are often cited as support for searches incidental to a lawful arrest do not aid the government in this case. In Bailey v. United States, 128 U.S.App.D.C. 354, 389 F.2d 305 (1967), (which was described as a hard case on its facts by the concurring judge), the lookout was for three Negro men who were seen escaping in a 1953 blue Chevrolet hardtop. About 20 minutes after the robbery a 1954 blue Chevrolet with four occupants was observed. The court held that there was probable cause to stop this car. The difference in the year of the car (1954 instead of 1953) was considered to be unimportant because the two models were very similar. The difference in number of occupants (four rather than three) could be explained since the lookout man could have waited in the car. In Brown v. United States, 125 U.S.App.D.C. 43, 365 F.2d 976 (1966), which involved even wider discrepancies, the arresting officers knew before the time of the arrest that Howard Johnson's Motor Lodge at Virginia Avenue, N.W., had been robbed at 4:20 in the morning

by a heavily-built Negro male who was seen escaping in a 1954 maroon Ford. Just 10 minutes later, the arresting officers stopped a 1952 maroon Ford driven by a heavily-built Negro. Despite the inaccuracy in the description of the man's height and clothing and the discrepancy in the year of the Ford, the court held that the accurate portions of the lookout provided sufficient probable cause.

In these cases, unlike the instant case, witnesses who observed the escape were able to give a nearly accurate description of the vehicle that was later stopped. There were discrepancies, but they were slight in view of the additional accurate information. Here there were also discrepancies, i.e., one occupant--not three or four--and a cream and orange Econoline truck rather than a green, van-type vehicle. But, more importantly, the information available to the police in the present case did not include supporting data that was accurate and which, standing alone, could have implicated the driver of the vehicle as the one who had committed the crime.

The conceded authority of the police to monitor traffic violations does not justify the action taken in this case, for the arresting officers did not believe the driver of the U-haul was committing any traffic offense (H. 11). The forceful detention, moreover, does not fall within the narrowly-drawn authority recognized in Terry v. State of Ohio, ____ U.S. ____, 88 S.Ct. 1868 (1968), allowing police officers to seize an individual without probable cause to believe a crime has been committed.

In Terry, a police officer of 30 years' experience in the detection of thievery from stores in the same neighborhood observed two men hovering about a street corner for an extended period of time, pacing alternatively along an identical route, pausing to stare in the same store window, and then conferring on the corner. The officer approached the men and, when they failed to clearly give their names, grabbed Terry, turned him around and searched his outer garments, finding a pistol.

The court in Terry said that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Id. at 1877. Even this seizure must not violate the Fourth Amendment's "general prescription against unreasonable search and seizure." Id. at 1879. But the court held that the officer's action in Terry was warranted because the facts supported a belief that "the individual whose suspicious behavior he is investigating at close range is armed and dangerous to the officer or to others. . . ." Id. at 1881. The court warned, however, that such conduct is "not justified by any need to prevent the disappearance of evidence of crime." Id. at 1884.

A comparison of the facts in Terry with those in the companion case of Sibron v. State of New York, ___U.S. ___, 88 S.Ct. 1889 (1968), is instructive. In Sibron a well-trained police officer observed the defendant over an 8-hour period in conversation with six or eight known narcotics addicts. When the defendant entered a restaurant and met several more addicts, the officer asked him to come outside. When the officer said "you know what I'm after," Sibron reached in his pocket. Simultaneously, the officer thrust his hand into the same pocket and

discovered heroin. The court held that this intrusion, unlike that in Terry, did not come within the narrowly-drawn authority sanctioned in that case since in Sibron the officer could not point to specific and articulate facts supporting a belief that the defendant was armed and dangerous to the police officer. Id. at 1903.

The facts surrounding the detention and arrest in the instant case did not support the police action, since the circumstances did not warrant a belief that the officers were endangered. The possibility that the officers would be unable to follow the vehicle and perhaps lose the evidence of the crime does not justify the detention (Terry at 1884).

We submit that it is clear on the facts and the present state of the law that the defendants' motion to suppress the evidence seized at the time of arrest should have been granted. Denial of the motion was clearly prejudicial because the evidence constituted an essential portion of the Government's case. See Chapman v. State of California, 386 U.S. 18 (1967); Fahy v. State of Connecticut, 375 U.S. 85, 86-87 (1963), which refers to the "reasonable possibility that the evidence complained of might have contributed to conviction."

## CONCLUSION

For the foregoing reasons, the appellants' conviction should

be reversed, their motion to suppress evidence should be granted, and a new trial should be ordered.

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(by Appointment of this Court)

February 4, 1969

CERTIFICATE OF SERVICE

I, , hereby certify that I have this day of February 1969, hand-delivered copies of the foregoing Consolidated Brief to:

Frank Q. Nebeker, Esq.
Assistant United States Attorney
United States Courthouse
Washington, D. C.

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BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21,804

EARL COLEMAN, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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No. 21,805

ALVIN TOBIN, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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No. 21,806

RONALD ALLSTON, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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No. 21,856

WINFIELD L. ROBERTS, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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**Appeal from the United States District Court for the District of Columbia**

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DAVID G. BRESS,
*United States Attorney.*

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
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*Assistant United States Attorneys.*

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# INDEX



## TABLE OF CASES

## OTHER REFERENCES



* Cases chiefly relied upon are marked by an asterisk.

## ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Was it an abuse of the trial court's discretion to permit the prosecutor to ask a character witness whether she had heard of four prior convictions of appellant Allston?

II. Did calling upon appellants Coleman, Tobin, and Allston by appellant Roberts to testify in the presence of the jury, where they declined, and a brief comment to this effect in closing argument deny them a fair trial, particularly in view of the corrective action of the court?

III. Was the motion to suppress evidence properly denied?

IV. Was the evidence sufficient to support appellant Roberts' conviction?

V. Did the prosecutor fail in a constitutional duty to disclose any evidence to appellant Roberts?

VI. Was appellant Roberts' motion for mistrial properly denied where it was based merely on the trial court allowing appellant Tobin to testify after all parties had rested?

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* This case has not previously been before this Court.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21,804

EARL COLEMAN, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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No. 21,805

ALVIN TOBIN, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

No. 21,806

RONALD ALLSTON, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

No. 21,856

WINFIELD L. ROBERTS, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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**Appeal from the United States District Court for the District of Columbia**

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**BRIEF FOR APPELLEE**

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## COUNTERSTATEMENT OF THE CASE

After trial by jury January 18-29, 1968 before Judge Burnita S. Matthews upon an indictment charging in count one unauthorized use of a vehicle (22 D.C. Code § 2204) and in counts two through twelve, entering a bank with the intent to commit robbery (18 U.S.C. § 2113 (a)) and robbery (22 D.C. Code § 2901),[1] these appellants were convicted and subsequently sentenced to one to five years on count one and five to fifteen years on counts two through twelve.

In view of the fact that appellee's reading of the record as it may relate to the various points raised is set out in connection with each argument, a detailed counterstatement is not undertaken here. In general, the Government's case drew quite a clear picture of the instant crimes.

### The Bank Robbery

Shortly before 10:00 a.m. on November 22, 1966 three or four Negro men, with faces covered, entered the Brookland Branch of the National Bank of Washington, D.C., 3806 Twelfth Street, N.E. and ordered everyone at gunpoint to lie on the floor (Tr.[2] 119, 120-127, 185). In no more than five minutes a total of $15,303.32 was taken and carried out in bags which looked like pillow cases (Tr. 120, 146, 200). After leaving the bank one of the robbers was seen getting into the front passenger side of a car, the District of Columbia tag number of

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[1] The thirteenth and final count charging carrying a dangerous weapon (22 D.C. Code § 3204) against appellant Coleman only was dismissed during trial upon Government motion (Tr. 752).

[2] The references to the trial proceedings reported by the same reporter will bear "Tr." designations. However on two occasions, January 24 and 25, 1968, another reporter was present. This reporter's two transcripts, for consistency with references already employed in the brief for appellants Coleman, Tobin and Allston, will be designated respectively as "Tr.(a)." covering pages 1-139 and "Tr.(b)." for pages 1-88.

which, 251219, was observed and recorded by one of the bank clerks, Mrs. Mary Highland before the car sped off (Tr. 200-201, 206-210). A short time later a car having this tag number, a blue 1966 Mustang as it turned out, was found abandoned at 14th and Perry Streets, N.E., a short distance from the bank, by Twelfth Precinct officers Ronald Ervin and Joseph Dardzinsky who were patrolling the area in their scout car after having briefly reported to the scene of the hold-up (Tr. 238-240, 269-270). The driver's door of the car was open, the motor was running, and rolls of coin were found in and about it (Tr. 239-241). A pistol was also found on the floor of the car (Tr. 535-536). Mrs. Teresa Rosser, who lived at 1334 Perry Street, N.E. was interviewed by the officers, and had observed around 9:20 a.m. a U-Haul van truck parked in front of her residence a short distance from the place the Mustang was abandoned. She recalled hearing a noise like a vehicle traveling at a high rate of speed and when she eventually looked out of her window she noticed the U-Haul truck had gone (Tr. 221, 223-225). An immediate look-out was broadcast over police radio (Tr. 243, 271).

**The Apprehension**

Close to 10:00 a.m. Officer James Lukic of the Fourteenth Precinct was patrolling with his partner in a scout car in the area of the Benning Road viaduct in southeast Washington when he received a report of the bank hold-up (Tr. 301). Upon receiving a look-out for a U-Haul truck, he went immediately to a point on Eastern Avenue overlooking Kenilworth Avenue, N.E. to observe traffic on that highway. At approximately 10:20 a.m., a U-Haul truck going southbound on Kenilworth Avenue, i.e. entering the District of Columbia, was seen and thereafter stopped in the 1000 block (Tr. 301-302, 389-390). The driver of the truck was appellant Coleman who upon searching had a loaded .22 calibre pistol in his pants pocket (Tr. 304, 328, 403-404, 419-420). Appellants Tobin, Allston, and Coleman were found on a mattress

in the rear of the truck where two bags of money, clothing, articles, and a .38 calibre snub-nosed pistol were found (Tr. 305-306, 331, 423-424) and later connected with the bank hold-up (Tr. 120-127, 141-146, 152, 156-157, 161, 166, 175, 178, 185, 193-194, 316, 323-331, 424-430, 440, 479-484). A black silk scarf and some of the money from the bank was found on Allston's person (Tr. (a). 26-28, 97, 99, 101, 105). Numerous local police officers and FBI agents who had arrived on the scene assisted with taking appellants into custody and securing property. The U-Haul van truck with contents intact was driven to police headquarters where it was photographed before the money, over $14,900, was carried to a robbery squad office and counted (Tr. 73-75, 424-425, 434).

**The Getaway Vehicles**

The U-Haul van truck had been rented November 20, 1966, two days before the robbery, from the Barney Circle Shell Station by Alvin Douglas at the request of his nephew, appellant Coleman,[3] who also provided the twenty-five dollar rental charge (Tr. 60, 65-67, 93). After the truck had been turned over to appellant Coleman he placed a mattress in it (Tr. 68, 70, 86).

Some time in the preceding month, October, Alvin Douglas was given an old car, a 1956 Dodge, by Hayes Nance who left on it his District of Columbia tags, with numbers 251219, solely to enable Douglas assisted by appellant Coleman to move the car on the streets (Tr. 50, 54-55, 57, 63). Mr. Douglas and appellant Coleman were in the "automobile business," and took the car to a garage with the intention of repairing it for possible sale (Tr. 63-64). In any event, the tags on the car were not returned to Mr. Nance but turned up on the 1966 Mustang, the car found abandoned a short time after the bank robbery (Tr. 56, 240). The Mustang itself had been

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[3] Appellant Tobin was with Coleman at the time of the request (Tr. 66).

taken without permission from the used car lot of Haley's Ford in the District of Columbia, where the keys to it had been left on the dashboard (Tr. 42-45).

**Defense and Rebuttal Evidence**

Commission of the crimes *per se* was not disputed by the appellants. Appellant Roberts, the only defendant to testify initially, stated that he had left his home around 8:00 a.m. on the day in question and had gone by a woman friend's house on Kenilworth Avenue. Finding that she was not in, he went to the bus stop near Kenilworth and Quarles Street, N.E., about three blocks away (Tr.(b). 20, 25). While waiting for a bus, a U-Haul truck passed on Kenilworth and upon stopping a short distance from him, appellant Tobin whom he knew, called to him from the back of the truck, offering him a ride into town. He did not know appellant Coleman, who was driving the truck, or appellant Allston who was in the rear of the truck (Tr.(b). 21-22, 25). They went only two or three blocks before they were stopped by the police (Tr.(b). 20). The short time he was in the truck he did not see any guns or money, noticing only the mattress (Tr.(b). 20-22, 25). The only money he had on him was $1.50 (Tr.(b). 23). He denied any knowledge or participation in the bank robbery (Tr.(b). 31) and later called upon each of his co-defendants, appellants herein, to testify, which they declined (Tr.(b). 84-85).

Appellant Allston, not testifying himself, called three witnesses Officers Ronald Ervin and Joseph Dardzinsky, who had previously testified for the Government, and Mr. Ira Gullickson, a questioned document examiner, for the purpose of impeachment (Tr. 897, 930, 947). A fourth, Miss Inez Milton, was called as a character witness (Tr. 966).

After the Government presented rebuttal evidence tending to show that the U-Haul van truck did not stop prior to the police stopping it on Kenilworth in the vicinity of Quarles Street, after entering the city (Tr. 1002-1007, 1021-1024), appellant Tobin, having previously decided

not to present any evidence, was allowed over appellant Robert's objection to re-open his case for the purpose of testifying (Tr. 1096, 1098). Appellant Tobin testified he and appellant Allston were on Kenilworth Avenue around 9:30 a.m. "catching out", i.e., hoping to be picked up for a day's work, when he flagged down appellant Coleman, whom he knew, in the U-Haul truck (Tr. 1099-1101). He and Allston got into the back of the truck which had gone on a few feet when he invited appellant Roberts to get in also (Tr. 1101-1105, 1163-1167). Shortly thereafter the truck was stopped by the police. Tobin also denied participation in the bank robbery (Tr. 1102). The Government again presented rebuttal evidence tending to show that the U-Haul truck did not stop after entering the city for appellant Tobin to enter it (Tr. 1176-1181, 1184-1188).

## ARGUMENT

### I. The trial court did not abuse its broad discretion in limiting the prosecutor to asking appellant Allston's character witness about four of appellant's prior convictions.

(Tr. 770-772, 965-966, 969-975, 980-981, 1246-1248)

Appellant Allston contends principally that the trial judge abused her discretion in allowing the prosecutor on cross-examination to ask a character witness, Miss Inez Milton, whether she had heard about four prior convictions of appellant—one for a 1957 violation of the Harrison Narcotics Act and three for petit larceny in 1964, 1966, and 1967 (Tr. 976-979). His objection to their use appears to be that (1) the prejudicial effect of their use outweighed any probative value because they were similar to the crimes charged,[4] (2) the felony conviction occurred prior to the time that the character witness became ac-

[4] Appellants' brief, pp. 14-15. In contradistinction, references herein to the separate brief of appellant Roberts will be as "Roberts' brief".

quainted with appellant,[5] and (3) cautionary instructions by the court could not remove any prejudice.[6] We view the objection without merit in all respects.

At once it is apparent that the trial judge was most conscientious here in exercising her discretion. Appellant Allston, not testifying himself,[7] originally planned to call ten or twelve witnesses to testify to his good character (Tr. 770). However, upon the court's ruling allowing the prosecutor to ask such witnesses whether they had heard about the above convictions,[8] he decided to call only one, Miss Inez Milton (Tr. 791, 965). After Miss Milton testified to appellant Allston's good reputation for peace, order and honesty, this testimony alone may be sufficient to raise a reasonable doubt of guilt.[9] *Michelson* v. *United States*, 335 U.S. 469 (1948); *Edgington* v. *United States*, 164 U.S. 361 (1896). Appellant appears not to dispute the price he might be required to pay by the prosecutor being able to test the witness' knowledge of reputation by determining if she had heard about mere misdeeds or arrests,[10] but bemoans the fact that here the petit lar-

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[5] Appellants' brief, p. 16.

[6] Appellants' brief, pp. 17-19.

[7] The prosecutor chose not to use any convictions for impeachment against Allston or any of the appellants if they wished to testify (Tr. 792-793).

[8] The prosecutor sought to use only convictions (Tr. 790), though aware mere arrests were permissible (Tr. 783).

[9] The jury was so instructed (Tr. 1246).

[10] ". . . The wisdom of this rule of law and the paradoxes it embraces are not open to us; the Supreme Court has approved these standards based perhaps not upon ideal considerations, but upon difficult choices. Thus a Defendant may try, whether or not he takes the stand, to cast doubt on the probability of guilt by showing that some in his community believe him to be truthful and honest. But a Defendant pays a price for attempting to show his good repute by opening 'the entire subject which the law has kept closed for his benefit and [thus making] * * * himself vulnerable where the law otherwise shields him.' *Michelson, supra*, 335 U.S. at 479. The prosecution may reply with other hearsay which may embrace rumors—

ceny *convictions* were "critically similar to that for which he was on trial" (Appellant's brief, p. 15). Certainly, considering the number of character witnesses appellant Allston intended to call to thrust his reputation in issue, it was highly proper and relevant in our view that the prosecutor test such witnesses' reliability. The record is replete with the exhaustive considerations in the light of relevant case authority respecting the scope of the prospective cross-examination (Tr. 770-792). Following the hearing, not only were mere arrests not used but some other convictions including another petit larceny (Tr. 790, 975). Without determining what similarity, or dissimilarity, petit larceny might bear to the instant offenses,[11] even assuming *arguendo* the similarity, this fact alone should not preclude their use by the prosecution. *Clark* v. *United States*, 57 App. D.C. 335, 23 F.2d 756 (1927) (prosecution for *grand larceny*—report of an *arrest* for *petit larceny*). Even in *Awkard* v. *United States*, 122 U.S. App. D.C. 165, 352 F.2d 641 (1965), upon which Allston heavily relies, it was not the use of the two previous arrests for assault with a dangerous weapon and a conviction for disorderly conduct where the accused was charged with simple assault and assault with the intent to kill, that this Court found prejudicial, but the prosecutor's improper use of such arrests and conviction in asking questions of purported character witnesses who had already admitted losing contact with the accused before these events occurred. Thus, the prosecutor's line of questioning could not test the accuracy, reliability or credibility of the testimony.[12]

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true or false—that the Defendant's reputation for the trait put in issue is not good . . ." *Shimon* v. *United States*, 122 U.S. App. D.C. 152, 156, 352 F.2d 449, 453 (1965).

[11] Appellant Allston has not attempted to draw any parallel to the crimes charged, unauthorized use of a vehicle, entering a bank with the intent to rob, and robbery.

[12] Although appellant Allston borrows heavily from the standards set out in *Gordon* v. *United States*, 127 U.S. App. D.C. 343, 383 F.2d 936 (1967) where the attack centers on the defendant's own credi-

Secondly, while appellant claims here that the 1957 felony conviction should not have been used because Miss Milton did not become acquainted with appellant Allston until 1962, it is born by an apparent misreading of *Awkard*.[13] In the instant case, as distinguished from *Awkard* the character witness lived in the same community as appellant when the alleged crimes took place (Tr. 966, 969-974) and could have heard of events or misdeeds occurring a few years before.[14] In *Awkard*, one "character" witness only knew the accused in a *different* community from that in which the subsequent arrests and conviction took place. The other witness admitted she knew nothing of the accused's reputation in the community and nothing about the accused after 1961, several years before the 1963 arrests and 1964 conviction about which the prosecutor needlessly asked.

Thirdly, in *Awkard* cautionary instructions could not cure the introduction of offenses by questioning witnesses clearly not in a position to know about them.[15] Here,

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bility, we note it is even suggested there that convictions for the same or similar crime "should be sparingly admitted," *id.* at 347, 383 F.2d at 940, not necessarily totally excluded. Here, of course, the considerations underlying the suggestion (for example, the possible precluding of a defendant from testifying) are not the same. Testing a character's witness' knowledge or standard of information may very well require the mentioning of more than one or two misdeeds or events. Even so, it appears here as already noted, arrests and some convictions were excluded.

[13] "In that case, as here, the character witness did not even know the defendant at the time one of the convictions occurred" (Appellants' brief, p. 16). The parties were known to each other—there was simply no contact.

[14] Appellant Allston was convicted of this felony in 1957 and sentenced January 10, 1958 to five years, making his probable return to the community, considering possible time credits on the sentence, around 1962—about the time Miss Milton said she became acquainted with him. For this reason, the conviction should not have been excluded on any "remoteness" grounds (Appellants' brief, p. 16). Nor should it have been considering the time (10 years) between the conviction (January, 1958) and trial (January, 1968).

[15] We are unwilling to assume, as appellant Allston does (Appellants' brief, p. 15) that here the character witness had already been

before the prosecutor used the convictions,[16] the trial judge in an extensive bench conference out of the hearing of the jury took pains to ascertain what they were and to require verification[17] (Tr. 770-773, 775-776, 787-788, 790-791). Having weighed the probative value against any prejudice and satisfying herself as to the truth of the bases for the prosecutor's inquiry, she allowed introduction of the convictions. Immediately after their use, she gave cautionary and guiding instructions to the jury (Tr. 980-981). Moreover, she repeated the instruction in her closing charge to the jury (Tr. 1247-1248).[18] See *Gross* v. *United States*, 394 F.2d 216 (8th Cir. 1968).

In all, we find nothing in the trial judge's ruling concerning impeachment of the character witness to warrant disturbance in this case.

> [R]arely and only on clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts on this subject. *Michelson* v. *United States*, *supra* at 480-481.

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"successfully" impeached. See (Tr. 969-974). Unlike in *Awkard*, her testimony could not have been striken. *Lomax* v. *United States*, 37 App. D.C. 414 (1911).

[16] No arrests were used as we have stated, avoiding the particular damage inhering in their use which this Court adverted to in *Awkard* v. *United States*, *supra* at 169, 352 F.2d at 641, n. 12.

[17] Thus adhering completely to the method that has met with the approval of the Supreme Court. *Michelson* v. *United States*, *supra* at 481. See McCormick, Evidence (1954), § 158, p. 337.

[18] We find a substantial difference in the ability of a jury to follow cautionary instructions limiting the consideration of prior convictions designed to test the credibility of a character witness and the type of instruction the jury must follow where a *confession* is introduced in a joint trial (See Appellants' brief, pp. 17-19). The suggestion that the jury would use the convictions not only to conclude that appellant Allston committed the charged crimes, but that appellants Coleman and Tobin did also, remains utter speculation.

**II. The calling upon appellants to testify by appellant Roberts in the presence of the jury where they declined to do so and a brief comment to such effect in closing argument was not sufficient to deny appellants a fair trial.**

(Tr. 1067-1078, 1081-1083, 1088-1089, 1094-1096, 1101-1105, 1163-1167, 1209-1220, 1246; Tr.(b). 20, 66, 69-70, 79-80, 82-85)

***Calling upon appellants to testify.***

Appellants contend that the court allowing their being called upon to testify in the presence of the jury by appellant Roberts, a co-defendant in their joint trial, resulted in prejudicial error. We disagree. The record shows that after appellant Roberts testified near the end of the trial and without any apparent notice to the court or the other parties, he called appellant Coleman to the stand (Tr.(b). 79). Thereupon at Coleman's request a bench conference followed in which the court was advised that he would not testify (Tr.(b). 80). After inquiry of counsel as to the manner in which the matter should be handled, appellant Coleman agreed that the court should instruct the jury that he had the right to take the stand or not as he saw fit and to indicate that he elected not to do so (Tr.(b). 80, 82). While counsel for appellants Allston and Tobin desired that their clients not be called at all in the presence of the jury, the court decided over their objection that the matter would be handled in the same manner (Tr.(b). 83, 84). Thereafter, when appellants Coleman and Allston were called in open court by appellant Roberts, the court made the announcement to the jury. Appellant Tobin specifically asserted his Fifth Amendment privilege not to take the stand, so the court merely announced he could not be called as a witness (Tr.(b). 84-85).

While it might have been improper for appellant Roberts to call the other appellants in front of the jury

knowing they would decline to take the stand,[19] we do not think this alone[20] created such error or prejudice by way of comment upon their failure to testify as to deny them a fair trial. We have not found, nor has appellant cited, any case which requires such a finding in these circumstances. In *United States* v. *Echeles*, 352 F.2d 892, 898 (7th Cir. 1965), the court in dictum suggests had Echeles called co-defendant Arrington, to the stand knowingly forcing him to decline to do so in front of the jury, such action would have caused prejudicial error to the co-defendant. However, this Court has determined, even

> [a]ssuming, as was held in Echeles, that a defendant may not call upon a jointly tried co-defendant to testify, *this alone is not sufficient to show prejudice.*

*(Rhozier) Brown* v. *United States*, 126 U.S. App. D.C. 134, 140, 375 F.2d 310, 316 (1966).

Moreover, if any prejudice to appellants occurred it was erased here we submit by the trial judge immediately telling the jury upon appellants being called to testify and their declining to do so, that such was their right.[21]

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[19] It would be error for the prosecution to call a witness to the stand, knowing that he will claim the privilege. *United States* v. *Maloney*, 262 F.2d 535 (2nd Cir. 1959); see *United States* v. *Edwards*, 366 F.2d 853, 870 (2nd Cir. 1966) (dictim). *Cf.*, *Douglas* v. *State of Alabama*, 380 U.S. 415 (1965). It would appear that a defendant who wishes to call a co-defendant is similarly inhibited. *United States* v. *Echeles*, 352 F.2d 892, 897 (1965); 8 Wigmore, Evidence (3d ed. 1940) § 2268; see McCormick, *supra* note 17, pp. 257-259 (1959). It does not appear however that this circuit has so held. *(Rhozier) Brown* v. *United States*, 126 U.S. App. D.C. 134, 375 F.2d 310 (1966), *cert. denied*, 388 U.S. 915 (1967).

[20] We do not assume, as appellants do, that the jury would regard any apparent colloquy between appellants and their attorneys, and the attorneys and the court in a bench conference (Appellants' brief, p. 21), *out of the hearing of the jury*, as any comment on the failure to testify. Compare *De Luna* v. *United States*, 308 F.2d 140 (5th Cir. 1962).

[21] Appellants appear to place equal reliance on *United States* v. *Housing Foundation of America*, 176 F.2d 665 (3rd Cir. 1949), but there the accused was *required* to take the stand and to *testify* over his objection. Even though the testimony was later stricken

There is no reason to assume that the jury attached any importance to their exercise of it.[22]

**Commenting in closing argument.**

A more difficult question is admittedly presented by counsel for appellant Roberts attempting to call attention in his closing argument to the other appellants' failure to testify. Near the end of a fairly lengthy argument, counsel stated to the jury that he wanted to call the appellants to support Roberts' testimony[23] and after an

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and the jury instructed in a closing charge not to make any presumption against the defendant for not taking the stand, the prejudice was ineradicable and reversal required.

[22] Somewhat apart from this, appellants suggests that when the trial judge became aware of Roberts' intention to call the appellants to the stand and their apparent adverse interests during the bench conference, she erred by not *sua sponte* ordering separate trials (Appellants' brief, pp. 27-30). At no time before or during trial did any appellant even suggest that severance should be granted. See *Rhone* v. *United States*, 125 U.S. App. D.C. 47, 365 F.2d 980 (1966). Viewing the matter as one of discretion by a trial judge faced with the delicate problem of protecting the interests of joint defendants, we do not think, nor apparently did appellants' counsel, that she was confronted with a problem which demanded so radical a solution as fragmentation of the trial. As Rule 14, Federal Rules of Criminal Procedure, recognizes, where authorized joinder may prejudice one or more of the defendants severance or *some other form of suitable relief* may be meet. As indicated, the court's announcement here was timely and appropriate.

Neither *De Luna* v. *United States*, *supra*, note 20, where the interests of the co-defendants were sharply antagonistic, nor *United States* v. *Echeles*, *supra*, involving the desire to call upon a co-defendant who had made statements in a previous trial exonerative of *Echeles*, do we find apposite on the question of severance here.

> The mere fact that appellant[s] might have had a better chance of acquittal if tried separately * * * does not establish [their] right to severance. *Robinson* v. *United States*, 93 U.S. App. D.C. 347, 349, 210 F.2d 29, 31 (1954).

[23] The following occurred:

> [ROBERTS' COUNSEL]: * * * Roberts didn't even know Coleman and Allston. You heard him call each one of these defendants to the stand and you probably wondered why and how I intended to prove Roberts' story and how I was going to

objection, the court reminded the jury of its previous announcement that the appellants could testify or not, as a matter of absolute right. Still apparently feeling that he could comment upon this, counsel for Roberts further implied by way of a hypothetical situation that Roberts could prove his innocence only by calling appellants. On objection again the court admonished counsel to "cease commenting upon the other defendants," and thereafter counsel concluded his argument. Appellants attempt to

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be able to say to each of these other men: Is it true that Roberts doesn't know you as he says he doesn't (?), but I didn't have that opportunity. That was my purpose, in trying to call them, because the only way I could support his testimony is by putting some evidence on the stand to give you the situation—

[ALLSTON'S COUNSEL]: I must object to that, Your Honor, I think that this is not proper argument and I object, if the Court please, and I ask Your Honor to instruct the jury to disregard it.

[COLEMAN'S COUNSEL]: I join in that.

[ALLSTON'S COUNSEL]: With reference to the other defendants.

THE COURT: I believe I told the jury the other day that they may testify or may not as they pleased. A defendant has an absolute right not to testify, if that is his choice.

[ROBERT'S COUNSEL]: May I comment on it?

THE COURT: Well, I think you have.

[ROBERTS' COUNSEL]: Well, you have got to try the case really on circumstantial evidence and when I say circumstantial, I'm not speaking of the robbery but I am speaking of circumstantial evidence in relation to tying up the defendant Roberts to the robbery.

What circumstances do we have—they are difficult to overcome. I would ask you this hypothetical case, that probably may never occur, but just think of this: You and I walk out into the corridor alone during a recess and then on reentering the courtroom you say: "That person took $100 out of my pocket". Now, there are just the two of us. How do I deny it ever happened, except by taking the stand and saying, "I didn't do it"? How could one prove that this never occurred? Now, isn't Roberts in that same position? These man wouldn't testify for him, so there he is—

[ALLSTON'S COUNSEL]: Your Honor, I ask Your Honor to instruct the jury to disregard that statement.

THE COURT: I have already instructed the jury. I think you should cease commenting upon the other defendants, Mr. [Defense Counsel]. (Tr. 1218-1220).

cast this case in the mold of *De Luna* v. *United States*, 308 F.2d 140 (5th Cir.), 1 A.L.R. 969 (1962), *reh. den.* 324 F.2d 375 (1963), and suggest that Roberts' comments should have met with "direct prohibition or emphatic condemnation of the court." (Appellants' brief, p. 25). We think the action of the court was appropriate and careful to prevent calling undue attention to appellants Coleman and Allston's silence.[24]

In extreme situations it would be unrealistic to believe that instructions to the jury, however made, can remove the prejudicial effects of a constitutional error and it has been so stated. *Krulewitch* v. *United States*, 336 U.S. 440 (1949) (concurring opinion of Justice Jackson at p. 453). Thus, in *De Luna* the effect of the error was too great to be cured by instruction. There De Luna and one Gomez were prosecuted on a narcotics charge. Gomez took the stand and testified that while traveling in a car De Luna tossed a package to him and told him to throw it out of the window.[25] Gomez further testified that he had no knowledge of the contents of the package. De Luna elected not to testify. Throughout his lengthy argument to the jury, counsel for Gomez emphasized that Gomez had taken the stand and told the truth but De

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[24] Appellant Tobin did testify. Having earlier decided not to, he, through counsel, beseeched the court to allow him to reopen his case for this purpose after all parties had rested (Tr. 1067-1078). After a decision not to allow it (Tr. 1081-1083), Tobin's counsel brought the matter up again (Tr. 1088-1089, 1094) and the trial judge, sensitive to the accused's right to testify and feeling no harm would be caused, reversed the decision (Tr. 1096). (We find it difficult to comprehend Tobin's complaint now that he was compelled by the court to testify, Appellants' Brief, p. 26, under all the circumstances).

In any event, Tobin, apparently taking his cue from Roberts, gave a belated version of events consistent with Roberts' testimony. Roberts had testified he was picked up at a bus stop on Kenilworth Avenue at Quarles Street, N.E. after Tobin, whom he knew, called to him from the U-Haul van truck and offered him a ride into town (Tr. (b). 20, 66, 69-70). Tobin said he had gotten into the U-Haul truck at a nearby point only moments before Roberts (Tr. 1101-1105, 1163-1167). Both under innocent circumstances.

[25] Officers saw Gomez throw the package out of the window.

Luna had not testified and had consequently not denied Gomez's version of what had happened. Gomez was acquitted. De Luna was convicted. On appeal, all judges agreed that prejudicial error had been committed against De Luna by permitting the reference to his failure to testify.[26] The majority opinion holds that Gomez's counsel had a right to comment upon De Luna's failure to testify even though the effect of such right was to create prejudicial error against De Luna.[27]

The instant situation is significantly distinguishable from *De Luna*. The degree of antagonism was greater in De Luna, which appellants recognize to an extent, and the defenses were mutually exclusive.[28] If one defense was believed, the other could not be. Here, as far as the Government's strong evidence would make any defense plausible, the jury did not have to believe that because the appellants did not take the stand that they, as opposed to Roberts, must have committed the offenses. Indeed, appellant Roberts' counsel embarks upon the comment stating that he merely wanted appellants to reinforce Roberts' claim that they were not known to each other (Tr. 1218), not to necessarily admit any guilt. Moreover, in *De Luna* casting guilt on co-defendant Gomez was integral to the defense and this was reflected in closing argument. In addition, the clear colloquy there between court and counsel *before the jury* could only highlight the argument. It was only after a great deal had transpired that the trial court decided to give any instruction. Here, by contrast, any comment came after extensive closing argument upon other points,[29] and must be viewed as comparatively isolated. Also the first reference to appellants in this context met with objection

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[26] Cases supporting such conclusions are adequately set out in the *De Luna* opinion.

[27] Circuit Judge Bell concurring specially, sets out the reasons why he believes counsel for Gomez had no right to comment.

[28] As demonstrated by appellant Tobin's belated testimony, they were not necessarily here. See note 24, *supra*.

[29] See Tr. 1209-1219.

and the court's reminder of the appellants' right not to testify. When the next reference is made by counsel for Roberts by way of an hypothetical example, he was admonished by the trial court not to comment further. In a few words his argument was concluded. We therefore think that here, unlike *De Luna*,[30] the complex problem of comment by counsel was not thrust on the full notice of the jury. Any that was, remained within reach of the court's proper and curative instructions[31] (Tr. 1219, 1220, 1246). The motion for mistrial was properly denied.

**III. The motion to suppress evidence was properly denied.**

(M. Tr. 4-11, 13-14, 16-17, 22-24)

Appellants maintain there was no probable cause for their arrest. We find a most compelling case for one.

At about 9:55 a.m. on November 22, 1966 Officer James E. Lukic, on patrol with his partner in the Fourteenth Precinct near the Benning Road viaduct in northeast Washington, D.C., received a police radio report of a hold-up of the Brookland Branch of the National Bank of

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[30] [C]onsidering the head-on collision between the two defendants, the repetition of the comments, and the extended colloquy over the comments between the trial judge and the lawyers, the imputation of guilt to De Luna was magnified to such an extent that it seems unrealistic to think that any instruction to the jury could undo the prejudicial effects of the reference to De Luna's silence. *Id.* at 154.

[31] It has been repeatedly held that should comment of counsel improperly trespass on the privilege of a witness to remain silent on Fifth Amendment grounds, prompt admonition followed by instructions to the jury would amply serve to eradicate any possible taint to the fairness of the trial. *E.g.*, *United States* v. *DiCarlo*, 64 F.2d 15, 17 (2nd Cir. 1933); *United States* v. *De Vasto*, 52 F.2d 26, 30, 78 A1.L.R. 336 (2nd Cir), *cert. denied*, 284 U.S. 678 (1931); see *United States* v. *Edwards*, 366 F.2d 853, 871 (2nd Cir. 1966). *Cf.*, *United States* v. *Kahn*, 366 F.2d 259, 263 (2nd Cir.), *cert. denied*, 385 U.S. 948 (1966).

The question is whether a jury can effectively follow the court's instructions and weigh the evidence separately against each defendant. *Bruton* v. *United States*, 319 U.S. 123 (1968), relied on by appellants, cannot stand for the proposition that juries are not competent to discharge these responsibilities under the circumstances of this case.

Washington, 3806 Twelfth Street, N.E. (M. Tr.[32] 4-6, 16). Five or ten minutes later, while making a bank check, a look-out was received to the effect that:

> Four Negro males, one Negro male was dark-skinned, heavy build, and wearing a large bushy mustache. These Negro males had entered a blue Mustang with D.C. registration and were seen leaving the scene of the holdup (M. Tr. 7)

Sometime within ten minutes later, making it approximately no later than 10:15 a.m., a third report was received that "the blue Mustang was found abandoned, and that they now may be in a U-Haul van-type truck" (M. Tr. 9). The officers proceeded to Kenilworth and Eastern Avenues, Northeast, planning to cover "a good escape route if they were coming back into the District" (M. Tr. 8-9). Taking an observation post on the Eastern Avenue overpass for Kenilworth Avenue and watching southbound traffic from Maryland (M. Tr. 9), the officer soon saw in the 1500 block of Kenilworth Avenue a U-Haul van-type truck[33] approaching (M. Tr. 9-10). At this time only the driver could be seen in the truck. Turning on the siren and dome light, Officer Lukic caused the truck to stop in the 1000 block of Kenilworth, believing it was connected with the reported bank robbery (M. Tr. 10-11). Stopping a few feet behind the truck, Officer Lukic then discerned clearly through the large rear view mirror of the truck that the driver was a dark-skinned Negro male with heavy mustache (M. Tr. 13-14). As he started to approach the driver, who had also gotten out of the truck and was walking towards him, he observed through rear windows "two heads pop up in the back of the truck and quickly back down again" (M. Tr. 22-23). Becoming more suspicious, Officer Lukic made the driver, appellant Coleman as it developed, place his hands on the side of the truck, while

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[32] Transcript of hearing on motion to suppress, May 12, 1967.

[33] The first one to be observed during this time (M. Tr. 17). It appears, however, that "van-type" was not mentioned in the actual look-out. See Government's Exhibit NN for identification, Criminal No. 195-67.

Officer Yates, his partner, opened the rear truck doors where three Negro males, appellants Tobin, Allston and Roberts, were sitting on the mattressed floor (M. Tr. 23-24). Found with them were articles of clothing, a torn sack containing money, and a .38 calibre revolver behind the driver's seat. A pistol was also found on the driver, appellant Coleman (M. Tr. 23-24).

Whether investigating the U-Haul van truck under the circumstances here was an arrest,[34] as appellant claims, or a momentary stopping,[35] as we choose to see it, it was eminently reasonable. Should the U-Haul van truck, the first to be seen a short time after the offense traveling an anticipated route, have been allowed to drive on, merely because the officers did not see four men as announced in the hold-up but only the driver of the truck? (Appellants' brief, p. 32). Appellee submits not.

As this Court has often said,

> probable cause . . . is a legal concept dependent . . . upon probabilities and practicalities as they would reasonably have appeared at the time to a prudent, cautious and trained police officer.

*Chappell* v. *United States*, 119 U.S. App. D.C. 356, 359, 342 F.2d 935, 938 (1965) and cases cited therein. It was

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[34] *Bailey* v. *United States*, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967).

[35] *Rios* v. *United States*, 364 U.S. 253 (1960); *Allen* v. *United States*, —— U.S. App. D.C. ——, 390 F.2d 476 (1968); *Brown* v. *United States*, 125 U.S. App. D.C. 43, 365 F.2d 976 (1966), n. 4; *Green* v. *United States*, 104 U.S. App. D.C. 23, 259 F.2d 180 (1958), *cert. denied*, 359 U.S. 917 (1959).

Appellant has placed some reliance in *Henry* v. *United States*, 361 U.S. 98 (1959). Suffice it to say

> *Henry* is extended much too far when argued as a holding that every stop is an arrest . . . [T]he following year in *Rios* v. *United States*, 364 U.S. 253, 262 (1960) the Court indicated that no arrest is involved when the detention of the person or vehicle involved is only what is incident to a brief on-the-street questioning for the purpose of clearing up suspicious circumstances. *Bailey* v. *United States*, *supra*, note 34, at 363, 389 F.2d at 314 (concurring opinion, J. Leventhal).

obviously more likely than not to these alert and intelligent officers that the unique U-Haul truck contained the culprits who perpetrated the bank robbery.[36] As Judge McGowan pointed out in *Dorsey* v. *United States*, 125 U.S. App. D.C. 355, 358, 372 F.2d 928, 931 (1967): "If policeman are to serve any purpose of detecting and preventing crime by being out on the streets at all, they must be able to take a closer look at challenging situations as they encounter them." Thus stopping of the vehicle was lawful. So was the subsequent search.

## IV. Sufficient evidence supported appellant Roberts' conviction.

(Tr. 42-44, 116, 119-120, 131, 138-139, 143, 146, 151-153, 161, 174-175, 185, 193, 198, 200-201, 205-209, 215-216, 239-240, 270-271, 300-301, 390, 411, 747, 750-751, 998, 1001, 1005-1007, 1024, 1293; Tr. (b). 20-22, 40-41)

Appellant Roberts complains of being unjustly convicted as the possibly superfluous fourth man in a "three-man robbery" (Roberts' brief, pp. 22-29). While we choose not to limit the bank robbery as necessarily the handiwork of three or four men, we think that appellant Roberts, apparently obsessed with this theory,[37] chooses to ignore strong evidence of record supporting his complicity and guilt.

Initially, we observe that while some tellers in the bank testified that they saw three men, masked sufficiently to

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[36] Compare *Bailey* v. *United States*, *supra*, note 34 (involving a blue 1953 or 1954 *passenger* Chevrolet). Appellants appear fascinated with the possibility that the U-Haul truck might have been "ECONOLINE" rather than "van-type", and "green" rather than an apparent orange and "cream", all of which was not in the actual look-out and we find of no substance.

[37] Roberts' motion for summary reversal, filed April 2, 1969 between filing of his brief and preparation of appellee's brief, was based on the same theory and case authority.

prevent identification,[38] enter the bank, it is clear to us that this may have been all they were in a position to see before complying with an order to lie on the floor in a quick sequence of events (Tr. 151, 153, 174, 193, 215). We would think it would scarcely need noting in this case, but for Roberts' claim, that in a crime of this nature the complete success of it depends as much on a "look-out" or "wheel man" as it does on the "stick-up" artists. That appellant Roberts was such a person himself is immaterial, since the evidence here adequately indicated the involvement of a fourth man. Mr. Robert Karpovich, branch manager of the bank, for example, saw *three* or *four* of the masked men come in the bank before lying on the floor (Tr. 116, 119). Mr. Robert E. Lee, a teller in the note department, specifically saw four masked men come into the front door of the bank (Tr. 138-139). Mrs. Mary C. Highland, a new accounts clerk, saw only three masked men come in but during the getaway and her observation of the rear of the car,[39] she saw two in the back of the car and a third man getting into it on the *front passenger side* (Tr. 200, 206, 209). Although Mrs. Highland did not see the driver (Tr. 206, 207, 209), we have some difficulty assuming in this apparently well-planned and smoothly executed hold-up that he was the last to get in. Moreover, Mr. Theodore W. Guinther, a customer in the bank at the time, also saw only three men *enter* the bank but there was a fourth man who almost escaped his notice, as he perhaps did in the case of some bank personnel (Tr. 747, 750).[40]

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[38] For the most part, the men wore dark sun glasses with a scarf or handkerchief covering the face (Tr. 139, 143, 152, 161, 175, 185, 208, 216, 411, 751).

[39] She observed the license numbers of the car, later identified as a stolen 1966 Mustang, which was shortly thereafter found abandoned with some proceeds of the hold-up in it (Tr. 42-44, 201, 239-240).

[40] Not to engage in appellant Roberts' numbers rubric but for some perspective, we note the following regarding testimony of the nine called witnesses in the bank:

[Footnote continued on page 22]

*Goodwin* v. *United States*, 121 U.S. App. D.C. 9, 347 F.2d 793, *cert. denied*, 382 U.S. 855 (1965) where a fourth man's conviction was reversed in a "three-man" robbery, furnishes the major thrust for Robert's claim of insufficient evidence. *Goodwin* however differs from the instant case in some significant respects. There, the four occupants of a getaway car were arrested an *hour* after the robbery of a grocery store. A search of the car turned up the stolen money as well as the gun used to threaten the store's proprietor. The robbery itself was committed by three men which the victim positively identified. Here, there was evidence showing the involvement of *four* men in the bank robbery, as already noted, who while still effectuating their escape, were captured within *twenty-five minutes* of the crime in possession of its proceeds (Tr. 119-120, 139, 146, 270-271, 300-301, 390). Obviously, the time involved in *Goodwin*, unlike here was such as to allow for the admission of an innocent passenger,[41] if not a complete change of persons in the car.

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[40] [Continued]

Three either apparently did not know the number of robbers who entered or were in the bank (Thelma Parker, Tr. 162; Gertie Bane, Tr. 174; Betty Wills, Tr. 193, 198).

Two could not be sure (Linda Crawford, thought three, Tr. 215; Robert Karpovich thought three or four, Tr. 119, 131).

Two saw only three men *enter* (Maxine Hayes, Tr. 410; Mary Highland, Tr. 200, 205, but note the possibility of the fourth man in the escape, *supra* at p. 21).

Two, as noted above, definitely saw a fourth man (Robert Lee and Theodore Guinther).

[41] As Vaughn, the fourth man, did in *Goodwin*, which the Court apparently thought significant, appellant Roberts denied participation in the crime. However Roberts' claim of being taken on as an innocent passenger on Kenilworth at Quarles while waiting for a bus is less than convincing, not only because of some inherent aspects (*e.g.*, social visiting at 8:00 a.m. even though he had not decided whether to go to work that day (Tr. (b). 20, 40-41) but also because of rebuttal evidence that showed the U-Haul truck did not stop in the District of Columbia prior to its being pulled over by the police (Tr. 998, 1001, 1005-1007, 1024). We wonder too, as did the trial judge (Tr. 1293), at the likelihood of bank robbers while still making their escape, stopping in a U-Haul van truck to pick up someone, albeit known to one of their number (Tr. (b). 21-22).

Moreover, on even less evidence of the involvement of a fourth person, conviction has been upheld. In *Bailey* v. *United States*, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967), the victim of a street robbery identified three men as his attackers, and three men were seen running from the scene of the crime. Twenty minutes after the crime four men were seen in a car conforming to a look-out. Forty minutes after the crime, four men were arrested as the occupants of the car, all having as the Court believed some part of the approximate $200 taken from the victim. While this Court considered the fact that each of the appellants there had immediate possession of some part of the loot as significant, the inference of guilt from posession of recently stolen property we submit is equally strong where Roberts shared the rear of the U-Haul truck with other appellants and the freely visible proceeds of the crime.

The evidence amply supports Roberts' conviction.

**V. The prosecutor did not fail to disclose any evidence to appellant Roberts.**

(Tr.(a). 47-51, 53-55, 60-61, 63, 67, 70-80)

Appellant Roberts appears to claim that the Government, in not calling witnesses to testify with regard to test results on items seized following the instant arrests and by resisting production of an FBI agent's "full report", suppressed evidence that "might have helped Roberts show that the third man in this robbery was Tobin and not Roberts" (Roberts' brief, p. 31). We cannot regard the claim as anything but frivolous.

As to the results of any tests, fingerprint or otherwise, it is no startling conclusion that the Government had no such evidence to connect any of the appellants with the crime.[42] If Appellant Roberts thought it so significant then he could have called witnesses himself or fairly com-

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[42] [I]f those results had been positive as to all four defendants the [G]overnment would certainly have used them. Its failure to do so indicated strongly that the test results were probably negative as to Roberts' (Roberts' brief, p. 32).

mented upon it in argument. He chose to do neither. On this score, there could hardly have been any failure of the prosecution to adhere to any constitutional duty of disclosure to Roberts.

Moreover, appellant Roberts neither asked for nor was entitled to the "full report" of FBI agent Hugh Berry who was called by the Government merely to establish a small link in the chain of custody of a few of the items seized at the time of the arrests (Tr. (a). 47-51). Roberts concluded his examination of this agent satisfied that he had no personal knowledge of the number of men involved with the robbery (Tr. (a). 53, 54-55). It was appellant Allston who determined that the agent was in charge of this particular investigation for the FBI and had merely compiled the reports of other agents respecting their interviews and investigation[43] (Tr. (a). 55, 60-61, 63, 74). We need not argue whether his composite report was producible at all, or if so, at what time and under what circumstances in view of the purpose for which he was called, since it appears that all the reports he assembled were turned over previously to defense counsel in connection with the testimony of particular witnesses (Tr. (a). 67, 73-75), and, in any event, the "full report" was perused by the court, with counsel, and contained no matters of apparent interest to Roberts (Tr. (a). 70-80).

**VI. Appellant Roberts' motion for mistrial was properly denied.**

(Tr. 1076-1078, 1082, 1096, 1101-1105, 1163-1167)

Finally, Roberts stated complaint is that it was an abuse of discretion for the trial judge to permit appellant Tobin to testify after he declined to take the stand several days

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[43] The agent interviewed only one person himself, a teller at the bank for the purpose of obtaining identification of some recovered coins (Tr. (a). 60, 63), and the resulting report was presented to the court and defense counsel (Tr. (a). 67, 70).

previously when called by him.[44] We admit some difficulty in understanding how appellant Roberts, ostensibly calling the other appellant to support his story,[45] should now claim prejudice because the trial judge, sensitive to the interests of all the accused allowed one, appellant Tobin, to testify after all parties had rested. Roberts only objection then was that it would delay the already lengthy trial and cause him prejudice in some way which he chose not to specify for the court (Tr. 1076, 1077-1078, 1082). In any event, Tobin's testimony was supportive in that he said Roberts got into the U-Haul truck, the second of the getaway vehicles employed by the bank robbers, only moments after he did, both innocently, on Kenilworth Avenue before it was stopped by the police (Tr. 1101-1105, 1163-1167). What we suspect is Roberts' real complaint is that appellant Tobin apparently concocted a version of events varying only slightly with his own testimony that must have made his defense appear, assuming it was not already, implausible or incredible, to the jury.

If we have interpreted Roberts' complaint correctly, we need only note further that if Roberts, notwithstanding his avowed desire to have appellants' supportive testimony earlier, had somehow changed his mind by the time Tobin

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[44] After a short argumentative breath, he claims that in view of this the trial judge erred in not *sua sponte* ordering "[a] separate trial for a defendant who needs to call co-defendants [appellants] to the stand to establish his innocence . . . ." (Roberts' brief, p. 38). We need only note as to severance that he at no time before trial sought it, nor apparently viewed any developments so adverse or prejudicial even at this twilight hour of a lengthy trial to suggest this extreme measure to the judge. See note 22, *supra*.

[45] Of course, if appellant Roberts merely wanted the other appellants to decline to testify in the presence of the jury, which he claimed as his right, he got whatever benefit there was from this also. The practice however, with no more reliable basis, may be subject to question under these circumstances. *United States* v. *Echeles, supra; Cf., Brown* v. *United States, supra,* note 19; *Allen* v. *United States*. 91 U.S. App. D.C. 197, 202 F.2d 329, *cert. denied,* 344 U.S. 869 (1952). *Echeles,* which Roberts cites, is hardly apposite as to him because there the co-defendant called upon had previously given under oath exonerative testimony, and calling upon him to testify in their joint trial was the only way Echeles could benefit from it after denial of a pre-trial motion to sever.

wanted to testify and would consider such testimony adverse or even prejudicial, then we do not understand his reason for not undertaking any examination of Tobin or presenting further evidence as the trial judge allowed to avoid him possible harm (Tr. 1096).

In our view, under all the circumstances Roberts "had his cake and ate it too." Mistrial on his now asserted grounds was hardly appropriate.

## CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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